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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARLON T. EMBRY, Defendant and Appellant.	D049666 (Super. Ct. No. SCD193959)

APPEAL from a judgment of the Superior Court of San Diego County, Pennie M. Carlos, Commissioner. Affirmed.

Marlon T. Embry entered a negotiated guilty plea to possessing a controlled substance (Health & Saf. Code, § 11350 subd. (a)) and admitted a prior strike (Pen. Code, §§ 667 subds. (b)-(i), 1170.12, 668). The court suspended imposition of sentence and placed him on three years probation for drug rehabilitation (Pen. Code[1], § 1210.) After revoking and reinstating probation on February 2, 2006, on May 12, 2006, the court again

1 All statutory references are to the Penal Code.

revoked probation and found Embry not amenable to treatment. The court denied Embry's motion to strike the prior strike (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and sentenced him to prison for 32 months: double the 16-month lower term for possessing a controlled substance with a prior strike. The court issued a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b).)

FACTUAL AND PROCEDURAL BACKGROUND

In December 2005, Embry pleaded guilty to possession of a controlled substance in exchange for probation under Proposition 36. Among other things, he was ordered to report to the probation department and to appear at a review hearing on January 4, 2006. At the January 4, 2006 review hearing, the court summarily revoked probation when Embry did not appear. On February 2, 2006, the court formally revoked and reinstated probation after Embry admitted failing to appear at the January 4 hearing. On April 5, 2006, the court summarily revoked probation after Embry failed to appear at a review hearing. On May 12, 2006, the court formally revoked probation after Embry admitted failing to appear at a review hearing on April 5. The probation officer advised the court that Embry had not contacted the probation office although he had assured the court at the February hearing that he would do so. The court said:

> "This is Mr. Embry's second drug-related violation. But more importantly, it's the second chance that he did have to at least report to probation to get started on treatment, which he did not do. It's my intention at this time to terminate him from Prop 36 because of his unwillingness to comply or inability, find him unamenable and set it for sentencing."

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible but not arguable issues: (1) whether the trial court abused its discretion in not reinstating probation; and (2) whether the trial court erred in denying the motion to strike the prior strike.

We granted Embry permission to file a brief on his own behalf. He has not responded. We requested additional briefing on the issue of whether the record contains sufficient evidence supporting the finding that Embry's drug problem is unamenable to treatment. Having reviewed the additional briefing, we conclude the evidence supports this finding.

"In general, Proposition 36 requires probation and drug treatment, rather than incarceration, for a defendant convicted after its effective date of a nonviolent drug possession offense . . . . (§§ 1210.1, subd. (a), 1210, subd. (a).)" (*People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1206.) It contains specific rules applicable when a defendant violates probation. (§ 1210.1.) "These rules, which are enunciated in subdivision (e) of section 1210.1, recognize that 'drug abusers often initially falter in their recovery' and 'give[] offenders several chances at probation before permitting a court to impose jail time.' " (*People v. Guzman* (2003) 109 Cal.App.4th 341, 347; *In re Taylor* (2003) 105 Cal.App.4th 1394, 1397.)

If a first time violation is a drug-related condition, the court must reinstate the Proposition 36 probation unless it finds the defendant is a danger to the safety of others. (§ 1210.1, sub. (e)(3)(A).) For a second drug-related violation, the trial court must reinstate the probation unless it makes specific findings the defendant is a danger to the safety of others or is unamenable to drug treatment. (§ 1210.1, subd. (e)(3)(B).)

In contrast, if the probation violation is non-drug related, the trial court has discretion to incarcerate the defendant. (§ 1210.1, subd. (e)(2); *People v. Dagostino* (2004) 117 Cal.App.4th 974, 988.) A failure to report to a probation officer may or may not be drug related; it is drug related when, for example, the purpose of the visit is to drug test. (*In re Taylor, supra,* at p. 1398, see also *People v. Atwood* (2003) 110 Cal.App.4th 805, 810-811.) This court, in *People v. Johnson* (2003) 114 Cal.App.4th 284, 299 held violating a general condition to report to a probation officer is not drug related when the defendant had never reported to the probation officer. (Contrast *People v. Atwood, supra,* at pp. 810-813 [where defendant failed to keep a scheduled appointment with her probation officer and prosecutor failed to present evidence as to purpose of appointment, case remanded to allow prosecutor to present evidence the appointment was non-drug related].)

As indicted above, the court here found this was Embry's second drug-related probation violation and that he failed in his second chance to start treatment. It found Embry unwilling or unable to comply and unamenable to treatment. As the People point out, Embry's failure to even begin drug treatment on two occasions could have been considered an implied refusal to engage in the treatment making him ineligible for

probation under section 1210.1, subd. (b)(4).) In any case, when a defendant fails to even contact the probation department to begin drug treatment, after failing once and acknowledging to the court that he would report to the probation department without fail because he was facing a strike prior, the trial court does not err in finding the defendant unamenable to drug treatment. (See *People v. Guzman, supra,* at p. 347; *People v. Johnson, supra*, at p. 299.)

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra*, 386 U.S. 738, has disclosed no other reasonably arguable appellate issue. Competent counsel has represented Embry on this appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.